THE WHITE HOUSE

WASHINGTON

March 21, 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
House of Representatives
Washington, D.C. 20515

The Honorable Eliot Engel
Chairman
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

The Honorable Adam B. Schiff
Chairman
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Messrs. Chairmen:

Thank you for your letters of February 21, 2019 and March 4, 2019 to Acting Chief of Staff Mick Mulvaney. Those letters seek information relating to the Presidential Records Act (the "PRA") as well as the President's actions in conducting foreign diplomacy. As I have previously stated, we will continue to work to accommodate the Committees' legitimate oversight interests while at the same time respecting the separation of powers and the constitutional prerogatives of the President. This good faith approach is guided by and consistent with long-standing precedent reflected in the holdings of the Supreme Court and other courts, in similar positions taken by past administrations of all political parties dating back to the Founding, and in numerous opinions of the Department of Justice's Office of Legal Counsel. It also has repeatedly been recognized by Congress itself. It is in the spirit of seeking accommodation and cooperation where possible, and always guided by a respect for the constitutional roles of each branch of government, that I provide this response.

First, to the extent that your letters seek information related to the White House's compliance with the PRA, we have already provided several responses to similar requests for this information. Specifically, I refer you to the prior responsive letters from the Office of White House Counsel dated April 11, 2017, October 10, 2017, and December 10, 2018, which were provided to the Committee on Oversight and Reform, and which we believe fully address your questions. As stated in those letters, the Administration is committed to compliance with the PRA and takes appropriate steps to ensure that Presidential records are appropriately managed, preserved, and available for transfer to the National Archives and Records Administration. If

you have any remaining questions regarding this issue, we are available at your convenience to discuss this matter further.

Second, your letters also seek detailed information concerning the President's conduct of foreign relations and his communications with his most senior advisors regarding these matters. For example, the letter of March 4 expressly seeks detailed information related to the President's meetings and telephone calls with Russian President Vladimir Putin, as well as confidential communications between the President and his advisors before and after those meetings and telephone calls. The March 4 letter also asks that "all White House or Executive Office of the President employees, contractors, or detailees, whether current or former, with knowledge of these communications," submit for transcribed interviews concerning the same subject. While we respectfully seek to accommodate appropriate oversight requests, we are unaware of any precedent supporting such sweeping requests. Rather, the Supreme Court and administrations of both parties have consistently recognized that the conduct of foreign affairs is a matter that the Constitution assigns exclusively to the President.

It is settled law that the Constitution entrusts the conduct of foreign relations exclusively to the Executive Branch, as it makes the President "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *see also Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("The President also possesses in his own right certain powers conferred by the Constitution on him as . . . the Nation's organ in foreign affairs."). In keeping with Supreme Court precedent, the Executive Branch has consistently taken the position, across administrations of both political parties, that the President has exclusive authority to conduct diplomacy with foreign nations. *See, e.g.*, *Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 7 (1996) ("[T]he conduct of foreign affairs is an exclusive prerogative of the executive branch"); *Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 124 (1995) ("It is well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States."); *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 256 (1989) ("The President has the responsibility, under the Constitution, to determine the form and manner in which the United States will maintain relations with foreign nations.").

This unbroken recognition that the Constitution assigns the conduct of foreign affairs exclusively to the Executive Branch is critical to a fair assessment of the Committee's legitimate oversight needs, because the Supreme Court has also made clear that, "[s]ince Congress may only investigate into those areas in which it may potentially legislate or appropriate, it *cannot inquire* into matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959) (emphasis added); *see also Scope of Congressional Oversight and Investigative Power With Respect to the Executive Branch*, 9 Op. O.L.C. 60, 62 (1985) ("Congress' power of inquiry must not be permitted to negate the President's constitutional responsibility for managing and controlling affairs committed to the Executive Branch.").

Accordingly, since the Founding, the Executive Branch has correctly and successfully asserted that information concerning the conduct of foreign affairs is, constitutionally, within the

exclusive control of the Executive Branch and Congress cannot demand its disclosure. "History is replete with examples of the Executive's refusal to produce to Congress diplomatic communications and related documents because of the prejudicial impact such disclosure could have on the President's ability to conduct foreign relations." *Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 6 (1996) (citing *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751 (1982)). Indeed, the very first administration emphatically made this exact point when President George Washington declined a House committee's request for copies of documents relating to the negotiation of the Jay Treaty with Great Britain. *See id.* at 753 (1982) (noting that President Washington sent a letter to Congress stating, "[t]o admit, then, a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign Power would be to establish a dangerous precedent.")

Even if the exclusive constitutional assignment of foreign relations authority to the Executive did not in itself limit congressional oversight power in this arena, it is equally well-established that privilege principles categorically protect the President's diplomatic communications. The President must be free to engage in discussions with foreign leaders without fear that those communications will be disclosed and used as fodder for partisan political purposes. And foreign leaders must be assured of this as well. No foreign leader would engage in private conversations with the President, or the President's senior advisors, if such conversations were subject to public disclosure (or disclosure to committees of Congress). For the same reasons, the President must be free to consult with his senior advisors—to ask frank questions, solicit and receive recommendations, weigh options, and debate policy alternatives. Otherwise, those advisors would be less likely to provide the President with candid advice.

This is why, from the Nation's beginning, Presidents from all political parties have determined that the law does not require the Executive Branch to provide Congress with documents relating to confidential diplomatic communications between the President and foreign leaders. For example, the Clinton Administration determined that documents requested by a congressional committee were not subject to disclosure because the documents related to the President's conduct of foreign affairs with Haiti. *See Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 5 (1996). In that case, the House Committee on Foreign Affairs (then known as the Committee on International Relations) requested, among other things, documents relating to communications between President Clinton and the leaders of Haiti. In response, Attorney General Janet Reno concluded that the President had the authority under the Constitution to protect the confidentiality of diplomatic communications. *Id.* As Attorney General Reno explained, the Constitution clearly gives the President "the authority to assert executive privilege to protect the confidentiality of diplomatic communications." *Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 5 (1996); *see also In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (information protected under executive privilege "includes information that would result in disruption of diplomatic relations with foreign governments.") (internal quotation marks omitted); *Halkin v. Helms*, 690 F.2d 977, 990 n.53 (D.C. Cir. 1982) ("The privilege extends to matters affecting diplomatic relations between nations.").

That being said, the Constitution requires both the Executive and the Legislative Branch to engage in an accommodation process. *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir.

1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches."). That process is not simply "an exchange of concessions or a test of political strength," but rather "an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981). The White House takes the accommodation process seriously. Since the beginning of the 116th Congress, we have made a principled effort at accommodation based on well-settled legal precedent. While we work to provide your Committees with information necessary for legitimate oversight, including by permitting the inspection of documents and offering briefings, as appropriate, the Committees appear up to now to be unwilling to make reasonable efforts in return to accommodate the legitimate interests of the Executive Branch. Rather, it appears that the practice of the Committees has been to request information that the Committees have no legal entitlement to receive and then to unfairly criticize the White House for simply adhering to consistent bipartisan past practice in its response. This White House is conducting the accommodation process based on well-settled law and in the very same manner as past Republican and Democratic administrations.

Importantly, the Committees' letters cite no legal authority for the proposition that another branch of the government can force the President to disclose diplomatic communications with foreign leaders or that supports forcing disclosure of the confidential internal deliberations of the President's national security advisors. To the contrary, the only justifications the March 4 letter cites to support the Committees' information requests do not pass muster under the principles announced in the Supreme Court decisions cited above. The letter asserts that the Committees need to determine the "impact of [the President's] communications on U.S. foreign policy" and to determine whether President Trump's conduct of foreign relations is "in the national interest." March 4 letter at 2. With all respect, the Constitution assigns the President the role of charting the course of U.S. foreign policy and determining which diplomatic communications advance the national interest. Policy disagreements with the President's decisions on those matters do not create a legislative right to review the President's diplomatic communications with foreign leaders. The only other justification cited in the March 4 letter is an asserted need for the Committees to assess whether "applicable laws, regulations, and agency procedures with respect to diplomatic communications" with foreign leaders "have been complied with and remain sufficient." *Id.* But, other than references to the PRA (which is addressed above), the letter cites no such law or regulation. And under longstanding precedent detailed above, Congress cannot require the President to disclose his confidential communications with foreign leaders.

This office is adhering to well-established precedent in order to protect the ability of this President, and future Presidents, to manage effectively the foreign affairs of the United States and to receive the advice and assistance of their close advisors in conducting diplomacy. We welcome the opportunity to discuss the clear legal principles applicable to this matter at your earliest convenience.

Finally, your March 4 letter states that "staff on all three of our Committees will jointly schedule a meeting with the White House Counsel shortly to discuss this request and ensure the scope is properly understood by the White House," but we have received no communication regarding this matter. In any event, as always, we would welcome the opportunity to meet with you to discuss this matter as part of the accommodation process. If you would like to discuss any of the issues addressed in this letter, please let me know.

Respectfully,

Pat A. Cipollone
Counsel to the President

cc: The Honorable Jim Jordan, Ranking Member, Committee on Oversight and Reform
The Honorable Michael McCaul, Ranking Member, Committee on Foreign Affairs
The Honorable Devin Nunes, Ranking Member, Permanent Select Committee on Intelligence